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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LLOYD LEE NELSON,

Petitioner,

v.

PIEDMONT AVIATION, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Lloyd Lee Nelson in this Reply Brief reiterates that:

THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

In its opposition to certiorari, the respondent Piedmont Aviation ("Piedmont") attempts to distinguish or downplay the importance of the "conflicting" cases cited in the petition. While the petitioner concedes that the present case is one of first impression and that the cited cases do not address the rights or protections of "appli-

cants for employment" under the Railway Labor Act ("RLA"), the cited cases do demonstrate that this Court and other courts of appeal have broadly construed the statutory definition of "employee." *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959) ("retired" workers are employees); *Air Line Pilots Association v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984) (*same*); *Andrews v. Louisville & Nashville R.R.* 406 U.S. 320 (1972) ("discharged" workers are employees); *Nashville, C. St. L. Ry. v. Railway Employees Dept.*, 93 F.2d 340 (6th Cir.), *cert. denied*, 303 U.S. 649 (1939) ("furloughed" workers are employees); *Florida East Coast Ry.*, NMB Case No. R-212 (1936) (*same*); *Southern Pacific Lines*, NMB Case No. R-426 (1938) (*same*).

In each of these cases, the courts broadly construed the RLA's statutory definition of "employee" to ensure that substantial justice was done based on the implied intent of Congress. The Fourth Circuit's narrow, literal construction of the RLA's definition of "employee" is in sharp contrast; and, if allowed to stand, defeats the intent of Congress to forbid carrier discrimination against workers.

Justice Black's discussion of the meaning of "employee" in the *Day* case [360 U.S. at 555 (Black, J., dissenting quoted at page 10 of the Petition], is of particular importance. While serving as a U.S. Senator from Alabama, Justice Black voted in favor of the 1934 amendments to the RLA, including the amendments to Section 1 *Fifth* (definition of "Employee"), Section 2 *Third* (forbidding interference, influence, or coercion in the selection of representatives), Section 2 *Fourth* (forbidding carrier

interference with employee organizational rights), and Section 2 *Fifth* (forbidding coercion of APPLICANTS FOR EMPLOYMENT through the use of "yellow dog" contracts). Notwithstanding Justice Black's arguments in favor of a strict, literal interpretation of "employee," the Court in *Day* opted for the broader reading. A similar result is appropriate in this case.

A review of prior railway labor legislation indicates that the term "employee" has changed very little over the past eighty-seven (87) years. Congress initially defined railway employees in the Erdman Act of 1898, 30 Stat. 424 (1898), providing that [t]he term 'employee,' as used in this act, shall include all persons actually engaged in any capacity in train operation or train services of any description. . . ." The Erdman Act was also the first railway labor law to forbid employer discrimination by outlawing "yellow dog" contracts.[1] The Newlands Act of 1913, 38 Stat. 103 (1913) retained this same definition of "employee." Although the RLA of 1926 modified the definition to take into account the functions of the Interstate Commerce Commission, there appears to have been no legislative discussion regarding the meaning of "employee."

It should also be noted that this Court has cited the RLA as one of the statutes without a particularized definition of "employee." In *United States v. American Trucking Ass'n*, 310 U.S. 534, 548 n.29, the court stated "where the term 'employee' has been used in statutes without particularized definition it has not been treated

[1] This portion of the Act was later nullified by this Court in *Adair v. United States*, 208 U.S. 161 (1908).

by the courts as a word of definite content." 310 U.S., at 548 n.29. The Court went on to state:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

Id. at 543-44 (Footnotes omitted). *See also United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). A broad interpretation of "employee" best effectuates the purposes of the RLA.

Although there was no significant change in the definition of "employee" from 1898 to 1934, Congress did take actions to ensure that unscrupulous carriers did not discriminate against railway workers because of their union or non-union beliefs. Of particular concern to Congress was the prevalence of "closed shops" and "company unions" used by carriers to deny railway workers their

right to freedom of association. In 1932 Congress declared "yellow dog" contracts to be against federal labor policy and repudiated them as a basis for legal or equitable relief in federal courts. 47 Stat. 70 (1932), 29 U.S.C. § 103. The 1934 amendments to the RLA outlawed both the "closed shop" and "yellow dog" contracts. 48 Stat. 1186 (1934), 45 U.S.C. § 152 *Fourth* and *Fifth*. There is ample legislative support for the proposition that Congress restricted the carriers' right to discriminate against workers because of the union or non-union beliefs.

It is respectfully submitted that the Fourth Circuit's decision, if allowed to stand, will undermine almost ninety years of progress in railroad and airline labor relations. A narrow, literal reading of the term "employee" will effectively deprive workers of the protections of the Act. An unscrupulous carrier, by pre-screening applicants for employment regarding their pro- or anti-union feelings, can completely negate the protections of the Act.

A writ of certiorari should issue.

THE ISSUE IN THIS CASE INVOLVES AN IMPORTANT QUESTION OF LAW.

In 1958, Associate Justice Harlan, in addressing the Bar of the City of New York, stated:

> The test of 'special and important reasons' for certiorari in nonconflict cases is not so susceptible of more or less exact statement. In this area the concept is a flexible one which will vary with chang-

> ing circumstances. I think that all that can be usefully said here on this score is to emphasize against something that cannot be too often repeated, namely, that it is the effect of the decision upon the 'exposition and enforcement' of the law, rather than its impact upon the parties in a particular case, that lies at the heart of the matter.

Harlan, *Manning the Dike,* (1958) (Eighteenth Annual Benjamin N. Cardozo lecture to the Association of the Bar of the City of New York). The importance of this case cannot be overestimated. Some one million workers are employed in the recently deregulated railway and airline industries. As carriers struggle to carve out niches in the suddenly competitive markets, there is a very great likelihood that some carriers will attempt to gain a competitive edge by denying workers their right to freedom of association.

This case offers the Court an excellent vehicle for ensuring that the will of Congress is carried out. A broad interpretation of the statutory definition of "employee" will ensure that railroad and airline workers enjoy the labor law protections Congress intended.

A writ of certiorari should issue.

CONCLUSION

For the reasons set forth in the petition and this reply brief, it is respectfully submitted that a writ of certiorari should issue and the case be set for plenary review.

Respectfully submitted,

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